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VIA ECFS

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

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Re: *In the Matter of Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Docket No. 15-247; Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25; and AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593*

Dear Ms. Dortch:

Despite the claims of some commenters,¹ there is no basis in the record for price regulating Ethernet services at any speed—a point the Chairman's October 7 Fact Sheet makes explicit.²

¹ See, e.g., Letter from Thomas Jones, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 2-4 (Oct. 20, 2016); Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 1, 3-4 (Oct. 31, 2016).

² See October 7 Fact Sheet at 1-2 (proposing, “[b]ased on the record,” a framework employing “lighter-touch regulation of packet-based services, where there has been new entry and competition may be emerging,” with no price caps, benchmarking, or other forms of ex ante regulation); see also Letter of Christopher T. Shenk, Counsel for AT&T Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25, RM-10593 at 10-13 (Oct. 6, 2016) (“AT&T October 6 Letter”); Letter from Matthew A. Brill, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 3-4 (Oct. 18, 2016) (“Comcast October 18 Letter”); Mark Israel, Daniel Rubinfeld and Glenn Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM and a Proposed Competitive Market Test: Second White Paper, *Business Data Services in an Internet Protocol Environment*, WC Docket Nos. 16-143, 15-149, 05-25, RM-10593 at 9, 26 (June 28, 2016) (“Second IRW White Paper”).

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Regulating Ethernet on this record would not only be arbitrary and capricious and counter to Commission precedent but also could fundamentally harm and alter this dynamic and evolving market.³

The Ethernet market is healthy and vibrant, with tremendous investment and falling prices. Charter alone has invested **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** since the beginning of 2013 in the expansion of its BDS capabilities, resulting in significant new fiber deployment to buildings and cell sites.⁴ At the same time, Charter's Ethernet prices have declined significantly across all speed tiers, including those offered at speeds below 50 Mbps.⁵ For example, legacy Time Warner Cable's average regional per-month price for a 10 Mbps Ethernet service has dropped by approximately 23 percent from 2013 to the first quarter of 2016. Similarly, the monthly price for legacy Time Warner Cable's 5 Mbps Ethernet service fell by approximately 29 percent over the same period.⁶ Charter's investments and pricing are representative of the "emerging competition" in the Ethernet market,⁷ which the evidence shows is robust—both "above and below 50 Mbps."⁸

³ See Letter of Drs. Joseph Farrell, Mark Israel, Michael Katz, Bryan Keating, John Mayo, Daniel Rubinfeld, and Glenn Woroch, WC Docket Nos. 16-143, 15-247, 05-25 at 2 (Sept. 14, 2016) (describing broad competitive expansion in the BDS marketplace, which "is highly likely to produce competitive benefits to customers"); Letter from Samuel L. Feder, Counsel for Charter, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 1-3 (Oct. 3, 2016) ("Charter October 3 Letter") (providing examples of significant facilities-based investment and network expansion); Comcast October 18 Letter at 3-4 (describing evidence of substantial and increasing competition for Ethernet services and the adverse effects of rate regulation).

⁴ Comments of Charter Communications, Inc., WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 5 (June 28, 2016) ("Charter Comments") (citing Declaration of Phil Meeks ¶ 3, attached as Exhibit A to Charter Comments); Charter October 3 Letter at 1 (explaining that Charter's investment has resulted in fiber connections to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** in legacy Time Warner Cable territory alone, including **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** per month for each of the last 6 months, and deployment of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** to connect cell sites for backhaul).

⁵ See Charter Comments at 5.

⁶ See Charter Comments at 7; *see also id.* at 6-7 (explaining that prices for 1 Gbps and 100 Mbps service tiers have also fallen dramatically).

⁷ October 7 Fact Sheet at 2; *see also* Charter October 3 Letter at 2; Comcast October 18 Letter at 3-4.

⁸ AT&T October 6 Letter at 10-13; *see also* Comcast October 18 Letter at 4; Letter from Curtis L. Graves, Assistant General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143, 05-25, RM-10593 at 4 (Oct. 31, 2016); Comments of United

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In light of this competition, it would be a drastic departure from Commission precedent to impose rate regulation, which has always been limited to situations in which providers exercise dominant market power or where there is a clear market failure,⁹ neither of which is plausible based on the evidence before the Commission.¹⁰ Moreover, regulating Ethernet pricing could actually reduce competitive options and cause significant harm, particularly for small business.¹¹ Small businesses (those with fewer than 25 employees) make up about **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of legacy Time Warner Cable's Ethernet customers, and **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of those small businesses purchase Ethernet services at speeds of 50 Mbps and

States Telecom Association, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 17 (June 28, 2016) (reporting on survey results from small and medium-sized businesses "indicat[ing] that [] competition is present at all levels of BDS offerings, and there does not appear to be [] a threshold below which there is a lack of competition"); Declaration of John W. Mayo ¶¶ 104-05 (concluding based on an examination of market data that no evidence of monopoly power exists and that bandwidth costs for Ethernet services are lower per megabit than legacy services) (attached as Exhibit B to Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (June 28, 2016)).

⁹ See, e.g., *In re Tariff Filing Requirements for Nondominant Common Carriers*, Notice of Proposed Rulemaking 8 FCC Rcd 1395, 1395 ¶ 3 (1993) (describing the Commission's findings that tariff regulation of carriers lacking market power was unnecessary and, in fact, harmful to competition); *In re Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12,763, 12,765-66 ¶ 12 (Nov. 5, 2015) (imposing rate caps, despite the Commission's "prefer[ence] to rely on competition and market forces to discipline prices," because the [inmate calling service] market "is a prime example of market failure").

¹⁰ Commission Staff concluded that "there is little indication of the presence of market power" with respect to high-bandwidth connections. See FCC Staff, *Distinguishing the Effects of Competition on ILEC Prices under Price Cap Only Regulation, Phase I Pricing Flexibility, and Phase II Pricing Flexibility* at 4 (June 28, 2016). Dr. Rysman's analysis similarly does not support imposing regulation here. Due to timing constraints, Dr. Rysman included packet-based BDS in his analysis *only* at speeds of 50 Mbps or higher, and he concluded that the presence of additional providers did not reduce prices at those speeds. See Dr. Marc Rysman, *Empirics of Business Data Services: White Paper* at 3, 23-24 & 18 n.35 (Apr. 2016) (revised June 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-340040A6.pdf; *id.* at 18 n.35.

¹¹ See Charter October 3 Letter at 3 ("Charter is increasingly concerned [] that regulating Ethernet pricing, as some have proposed, could deter further investment and thwart the very competition the Commission has long sought to promote."); *id.* at 4 (explaining that, based on Charter's analysis of the Verizon-INCOMPAS proposal, in areas where AT&T is the competing ILEC, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION], meaning that customers "would not have had Charter as a fiber alternative to AT&T, resulting in diminished service offerings and competition").

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below.¹² Indeed, if the Commission were to rate regulate below 50 Mbps, Charter would likely reassess providing services at those speeds, which could eliminate a competitive option for small businesses. Accordingly, as the Chairman's Fact Sheet appropriately concludes, the Commission should refrain from regulating Ethernet services at any speed, or, at a minimum, should seek further comment before adopting any regulations that directly or indirectly impact Ethernet pricing.

Please contact me if you have any questions regarding these matters.

Sincerely,

/s/ Samuel L. Feder

Samuel L. Feder
Counsel for Charter Communications, Inc.

¹² *Id.* at 3 (explaining that, even if the Commission does not regulate new entrants, such as Charter, "Charter and other new entrants would be effectively capped by the ILEC rates" because "the ILEC is the market leader, and customers can easily take service from the ILEC if its pricing is cheaper").